

A Hew Tze Ken v United Soil Engineering Sdn Bhd

B HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP
 NO D10(D5)–28–521 OF 2005
 APANDI ALI J
 24 JULY 2009

C *Companies and Corporations — Winding up — Petition — Whether petitioner proven allegations relied upon to wind up respondent — Whether directors acted in affairs of company in their own interests — Whether just and equitable for respondent to be wound up — Companies Act 1965 s 218*

D The petitioner was a registered member of the respondent, a limited company carrying out soil, rock and ground water investigations. At all material times, the petitioner and one Foo Khee Voon ('Foo') were the two principal directors of the company. It was the petitioner's contention that the directors of the respondent company had acted in the affairs of the company in their own interest rather than in the interests of the members as a whole and that it was just and equitable that the company be wound up. The petitioner had therefore filed this winding up petition against the respondent pursuant to s 218(1)(f) and (i) of the Companies Act 1965. In its petition the petitioner averred that the respondent was a quasi-partnership between the petitioner and Foo and that the management powers and affairs of the company had to be exercised as in a quasi-partnership. It also averred that the respondent was currently a dormant entity, and that it had no employees because all its employees had been transferred to its subsidiary United Soil Sdn Bhd ('USSB'). In support of its contention that the directors of the company had acted in their own interest the petitioner cited the decision of the directors of the company in sanctioning the sale of USSB to Foo at a gross undervalue of RM250,000, in breach of the rules of maintenance of share capital. At the same time the petitioner also applied for interim relief and an interim order by consent ('the interim order') was entered into between the parties pending the disposal of the petition. Thereafter the petitioner filed a summons in chambers application whereby he sought to restrain the respondent company, inter alia, from making payments of salaries or allowance to Foo, on the grounds that these payments were in breach of the interim order. The petition for winding up, the application for interim relief and the application for an injunction were tried simultaneously. In response to the petition the respondent submitted, inter alia, that it was never a quasi-partnership and was at all material times run as a corporation; that any proposal to wind up must be properly resolved at a shareholders' meeting or board of directors'

meeting by the passing of a directors' resolution or shareholders' resolution to wind up; that the sale of the USSB shares by tender was done openly and transparently. The contributories of the company also made similar averments.

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Held, dismissing the petition for winding up, the applications for interim relief and injunction with costs:

- (1) At all material times the respondent company had been run as a corporation and there was never any understanding between the directors/shareholders of the respondent that management powers were to be exercised as a quasi-partnership (see para 13).
- (2) Any proposal to wind up the respondent must be properly resolved at the board of directors meeting or shareholders' meeting. However, in the present case no resolution was passed to wind up the respondent company (see para 14).
- (3) The entire exercise for the sale of USSB shares was carried out with transparency and proper corporate governance. The steps taken were above board as was evident from the fact that the exercise was supervised by independent professionals. As such from the facts the petitioner had failed to prove the allegations he relied on to wind up the respondent (see paras 15 & 16).
- (4) Foo's position as caretaker director of the respondent had been approved by the board of directors and as such the payments to him were made in the ordinary course of business (see para 17).
- (5) Since the petition to wind up had been disposed of the petitioner's application for interim relief became academic (see para 18).

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[Bahasa Malaysia summary]

Pempetisyen merupakan ahli berdaftar responden, sebuah syarikat terhadap yang menjalankan penyelidikan tanah, batu dan air bawah tanah. Pada masa matan, pempetisyen dan Foo Khee Voon ('Foo') merupakan dua pengarah utama syarikat tersebut. Pempetisyen menghujah bahawa pengarah-pengarah syarikat responden telah menguruskan syarikat tersebut mengikut kepentingan mereka berbanding kepentingan ahli-ahli keseluruhannya dan adalah adil dan saksama bahawa syarikat tersebut digulungkan. Oleh itu pempetisyen memfailkan petisyen penggulungan terhadap responden menurut s 218(1)(f) dan (i) Akta Syarikat 1965. Dalam petisyennya, pempetisyen menegaskan bahawa responden adalah kuasi-perkongsian di antara pempetisyen dan Foo dan bahawa kuasa pengurusan dan urusan syarikat perlu dilaksanakan dalam bentuk kuasi-perkongsian. Ia juga

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- A menegaskan bahawa responden pada masa ini merupakan entiti pendam, dan bahawa ia tidak mempunyai pekerja-pekerja kerana semua pekerjanya dipindahkan kepada subsidiarinya, United Soil Sdn Bhd ('USSB'). Sebagai menyokong hujahannya bahawa pengarah-pengarah syarikat telah bertindak mengikut kepentingan mereka, pempetisyen memetik keputusan
- B pengarah-pengarah syarikat yang membenarkan penjualan USSB kepada Foo pada bawah nilai kasar RM250,000, di mana melanggar peraturan pengkalan modal syer. Pada masa yang sama pempetisyen juga memohon untuk relief interim dan perintah interim melalui persetujuan ('perintah interim') yang dimeterai di antara pihak-pihak sementara menunggu petisyen diberikan. Selepas itu pempetisyen memfailkan saman dalam kamar di mana dia menuntut untuk menghalang syarikat responden daripada membuat bayaran gaji atau elaun kepada Foo, atas alasan bahawa bayaran ini melanggar perintah interim. Petisyen penggulungan, permohonan untuk relief interim dan injuksi dibicarakan bersama. Sebagai menjawab petisyen tersebut
- D responden menghujah, bahawa ia bukanlah kuasi-perkongsian dan pada masa matan dijalankan sebagai satu perbadanan; bahawa mana-mana usul untuk penggulungan perlu diselesaikan di mesyuarat pemegang-pemegang saham atau lembaga pengarah dengan kelulusan resolusi pengarah atau pemegang saham untuk penggulungan tersebut; bahawa penjualan saham USSB melalui tender dilakukan secara terbuka dan jelas. Penyumbang-penyumbang syarikat juga membuat penegasan yang sama.
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- F **Diputuskan**, menolak petisyen penggulungan, permohonan untuk relief interim dan injunksi dengan kos:
- (1) Pada masa matan syarikat responden dijalankan sebagai satu perbadanan dan tidak terdapat kata sepakat di antara
- G pengarah-pengarah/pemegang-pemegang saham bahawa kuasa pengurusan dijalankan sebagai kuasi-perkongsian (lihat perenggan 13).
- (2) Apa-apa usul untuk menggulungan responden perlu diselesaikan secara baik di mesyuarat lembaga pengarah atau pemegang-pemegang saham. Walau bagaimanapun, dalam kes ini tiada resolusi yang
- H diluluskan untuk menggulungan syarikat responden (lihat perenggan 14).
- (3) Semua perlaksanaan untuk penjualan saham-saham USSB dijalankan dengan jelas dan melalui sistem urusan perniagaan yang baik.
- I Langkah-langkah yang diambil adalah benar sepenuhnya seperti yang dibuktikan oleh fakta bahawa perlaksanaan tersebut diawasi oleh profesional-profesional bebas. Oleh itu daripada fakta-fakta pempetisyen telah gagal membuktikan dakwaan yang digunakan untuk menggulungan responden (lihat perenggan 15 & 16).

- (4) Kedudukan Foo sebagai pengarah sementara responden dipersetujui oleh lembaga pengarah dan bayaran-bayaran kepadanya dibuat dalam urusan biasa perniagaan (lihat perenggan 17). **A**
- (5) Memandangkan petisyen penggulangan telah ditolak maka permohonan pempetisyen untuk relief interim menjadi akademik (lihat perenggan 18).] **B**

Notes

For cases on petition, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1321–1456. **C**

Cases referred to

Ebrahimi v Westbourne Galleries Ltd & Ors [1973] AC 360, HL (refd)

Kok Fook Sang v Juta Vila (M) Sdn Bhd [1996] 2 MLJ 666, CA (refd) **D**

Legislation referred to

Companies Act 1965 s 218(1)(f), (i)

Peter Skelchy (Cheah Teh & Su) for the petitioner.

Ramdas Tikamdas (Siva, Ram & Associates) for the respondent. **E**

Bharti Seth (Bharti Seth & Associates) for the contributories.

Noormazlinah (Insolvency Department Malaysia) for the official receiver.

Apandi Ali J: **F**

[1] There are three enclosures involving interlocutory matters that came for hearing and it was agreed by all parties that the said enclosures are to be tried simultaneously. The said three enclosures are: **G**

(a) ENCLOSURE 1

This is a petition for winding-up under s 218(1) and (i) of the Companies Act 1965.

(b) ENCLOSURE 3 **H**

This is the petitioner's application for interim relief, where by consent an ad interim order was entered into between the parties, pending the disposal of the petition.

(c) ENCLOSURE 33 **I**

An application for an injunction by petitioner that:

- (i) the respondent and/or its agent and/or servants and/or nominees and/or its subsidiaries be hereby restrained from making payments to Foo Khoo Voon in the form of salaries, allowances,

- A performance fees and/or in any form or manner whatsoever in his capacity as caretaker director of the respondent and/or in any other related capacity;
- B (ii) the respondent do produce to the petitioner a true and perfect account of all payments made to Foo Khee Voon by the respondent and/or its subsidiary, United Soil Sdn Bhd in any manner whatsoever in his capacity as caretaker director of the respondent; and
- C (iii) the petitioner be at liberty to apply for such further orders and/or directions from time to time as may be necessary or expedient.

[2] Besides the petitioner and the respondent, the hearing also involved another party, a contributory.

D BACKGROUND OF CASE

- E [3] The petitioner is a registered member of the company holding 38,750 ordinary shares of the 150,000 ordinary shares at RM1 each. The company is a limited company.

[4] The principal activity of the company is the carrying out of soil, rock and ground water investigations.

- F [5] On 19 July 2005, the petitioner filed a petition (encl 1) to wind up the respondent. At the date of the presentation of the petition the two principal and working directors of the company are the petitioner and Foo Khee Voon.

- G [6] The petitioner also filed an application for interim relief where an ad interim order (encl 3) and by consent was entered into on 25 July 2005 between the parties, pending the disposal of the petition.

- H [7] Thereafter on 6 June 2008 the petitioner filed another summons in chambers (encl 33) seeking to restrain the respondent, inter alia, from making payments of salaries or allowance to Foo Khee Voon in his capacity as caretaker director of the respondent and/or other related capacity.

- I [8] *The petitioner's submission*, in brief, are as follows:
- (a) The respondent is a quasi-partnership between the petitioner and Foo Khee Voon and the management powers and the affairs of the company must be exercised with regard to the obligations appurtenant to the quasi-partnership and not according to the company structure.

- (b) In the handover report dated 20 April 2005, the express agreement of the parties were clearly set out as follows: A
- (i) that the director had agreed to tune down and to cease operations completely in the shortest possible time; B
 - (ii) oversee the sale of fixed and landed assets; B
 - (iii) to monitor United Soil Sdn Bhd, to ensure that the obligations of the sale and purchase agreement are met; and C
 - (iv) to voluntarily liquidate the company upon the completion of the above. C
- (c) The respondent no longer has any employees due to the fact that they have been transferred to her subsidiary, United Soil Sdn Bhd (USSB). The respondent is currently a dormant entity, as its substratum has in effect disappeared. D
- (d) The directors had acted in a manner in which the assets available for distribution to shareholders have been significantly reduced or the directors have authorised a scheme in effect which constitutes a return of company assets to a particular shareholder. E
- (e) The sale of USSB to Foo Khee Voon for the sum of RM250,000 was made at a gross undervalue, in breach of the rule of maintenance of share capital. E
- (f) The decision of the directors of the company in sanctioning the sale of USSB to Foo Khee Voon at a gross undervalue of RM250,000 constitute a clear situation where the directors of the company have acted in the affairs of the company in their own interest rather than in the interest of the members as a whole. F
- (g) The filing of encl 33 was necessary as the payments to Foo Khee Voon in his capacity as caretaker director were not made in the ordinary course of business and were in breach of the ad interim order dated 25 July 2005. G
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- [9] The *respondent's submission*, in brief, are as follows:
- (a) The respondent was never envisaged as a quasi-partnership. There was never any understanding between the director/shareholders of the respondent that management powers were to be exercised as a quasi-partnership. To the contrary, it was, at all material times, run as a corporation. I

- A** (b) Any proposal to wind up the company, must be properly resolved by the board of director or a shareholders' meeting. There is no board of director's resolution or a shareholders' resolution to wind up the respondent.
- B** (c) Based on the board of directors' decision on 5 May 2005, the earliest time at which the option to purchase the respondent could be exercised or the respondent be voluntarily liquidated by the board of directors would be 30 June 2007 subject to an extension until 30 June 2008.
- C** (d) The sale of the United Soil Sdn Bhd (USSB) shares by tender was done openly and transparently, with the supervision of independent professionals and the petitioner himself was given every opportunity to bid but he chose not to do so.
- D** (e) The petitioner has come to court with unclean hands, as the petition was filed for a collateral and oblique purpose and his conduct has been oppressive to the majority shareholders and unconscionable.
- E** (f) As to Foo Khee Voon's position as caretaker director of the respondent is concerned, this has been approved by the board of directors meetings held on 5 May 2005, 29 May 2006, 16 October 2006 and 27 November 2006. The petitioner has himself earlier proposed the outsourcing of the scope of work of caretaker director of the respondent.
- F** [10] The *contributories' submission*, in brief, are as follows:
- G** (a) Considering the background of the respondent from the time of inception of the respondent to the date of the presentation on the petition on 19 July 2005 and till today the respondent was been run as a corporation and it was never a quasi-partnership. There was never an agreement in existence between the petitioner and Foo Khee Voon or between any of the other shareholders of the respondent to the effect that the respondent was a quasi-partnership to be operated only by the petitioner and Foo Khee Voon;
- H** (b) There never existed any agreement to wind up the respondent. The petitioner himself is fully aware of the fact that the respondent can only be voluntarily wound up upon the completion of the affairs of the respondent;
- I** (c) Based on the board of directors' decision on 5 May 2005, the earliest time at which the option to purchase the respondent or the respondent be voluntarily liquidated can be exercised is upon the completion of the SPA for the sale of USSB shares, namely on 30 June 2007 or the extended completion date, which is 30 June 2008;

- (d) The entire exercise for the sale of United Soil Sdn Bhd shares was carried out with transparency and corporate governance. The steps taken were above board and this is evident by the appointment of independent parties and a lawyer to open the tenders; and A
- (e) That the petitioner had instructed his solicitors to inform RHB Bank that a winding up petition has been presented against the respondent. This act of the petitioner is an unconscionable conduct on the part of the petitioner. B

FINDINGS C

[11] The petitioner filed this winding up petition against the respondent pursuant to s 218(1)(f) and (i) of the Companies Act 1965 which provides:

218 Circumstances in which company may be wound up by Court D

(1) The Court may order the winding up if —

- (f) The directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members; E
- (i) the Court is of opinion that it is just and equitable that the company be wound up; F

[12] To succeed in this petition, the petitioner has to prove that the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, and/or it is just and equitable that the company be wound up. G

[13] The petitioner claims that the respondent is a quasi-partnership between the petitioner and Foo Khee Voon and the management powers and the affairs of the company must be exercised with regard to the obligations appurtenant to the quasi-partnership and not according to the company structure. There was never any understanding between the directors/shareholders of the respondent that management powers were to be exercised as a quasi-partnership. On the contrary, it was at all material times run as a corporation. Considering the background of the respondent, from the time of inception of the respondent to the date of the presentation of the petition on 19 July 2005 and till today the respondent was been run as a corporation and it was never a quasi-partnership. I refer to the case of *Kok Fook Sang v Juta Vila (M) Sdn Bhd* [1996] 2 MLJ 666, where the Court of Appeal approved the principle in *Ebrahimi v Westbourne Galleries Ltd & Ors* [1973] AC 360 where Lord Wilberforce said: H
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- A** ... But where the company is not in substance an incorporated partnership, such situations are no longer grounds for a winding up order to be made under the rule as the use of the partnership analogy is no longer valid.
- B** [14] Another ground given in filing this petition is that there was an agreement to wind up the respondent. To my mind, any proposal to wind up, must be properly resolved by the board of director or a shareholders' meeting. There is no board of directors resolution or a shareholders' resolution to wind up the respondent. The handover report was considered at the board of
- C** directors meeting on 5 May 2005 where it was decided that 'upon completion of remaining affairs of the company individual directors have the option to purchase company or the board will resolve to voluntarily liquidate the company' (see annexure I in encl 1). Based on the board of directors decision
- D** on 5 May 2005, the earliest time at which the option to purchase the respondent could be exercised or the respondent be voluntarily liquidated by the board of directors, would be 30 June 2007 subject to an extension of time, to 30 June 2008 (see annexure G in encl 1).
- E** [15] On the petitioner's allegation that the sale of USSB to Foo Khee Voon for the sum of RM250,000 was made at a gross undervalue in breach of the rule of maintenance of share capital; it can be seen that immediately after the meeting on 24 June 2005, the bid manager, Messrs Proact Services Sdn Bhd issued the letter of invitation for the tender exercise dated 27 June 2005 (see
- F** annexure N in encl 1). The tender was opened and also extended to the petitioner. The entire exercise for the sale of USSB shares was carried out with transparency and proper corporate governance. The steps taken were above board and this is evident by the appointment of independent parties, bid managers and a lawyer to open the tenders;
- G**
- H** [16] On the facts it can be concluded that the petition has failed to prove the allegations on which he is relying on, to wind up the respondent, namely on just and equitable ground and/or that the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole;
- I** [17] The petitioner also contends that the filing of encl 33 was necessary as the payments to Foo Khee Voon in his capacity as caretaker director were not made in the ordinary course of business and were in breach of the ad interim order dated 25 July 2005. From facts adduced it is clear that Foo's position as caretaker director of the respondent has been approved by the respective board of directors meetings on 5 May 2005, 29 May 2006, 16 October 2006 and 27 November 2006. In fact, it was the petitioner himself who had earlier

proposed the outsourcing of the scope of work of caretaker director of the respondent at the board of directors meeting on 27 November 2006 (see exh M-4C in encl 35);

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[18] Enclosure 3 is the petitioner's application for interim relief where an ad interim order was by consent, entered into between the parties, pending the disposal of the petition. Since the petition has been disposed of, this application will thus becomes academic.

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[19] Based on the above findings, I conclude that it is neither just nor equitable for the respondent company to be wound up. Wherefore encll 1, 3 and 33 is hereby dismissed with costs, with costs to the respondent and the contributory.

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Petition for winding up, application for interim relief and an injunction dismissed with costs.

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Reported by Kohila Nesan

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